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No. 74-1413

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL., PETITIONERS

v.

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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Washington, D.C. 20530.

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This supplemental memorandum discusses important congressional action and a decision by this Court subsequent to the filing of our petition.

1. On August 9, 1975, President Ford signed Public Law 94-83, amending Section 102(2) of the National Environmental Policy Act of 1969.[1] Pub. L. 94-83 moots the first question presented by our petition; it provides that an environmental impact statement "shall not be deemed to be legally insufficient solely by reason of having been pre-

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[1]Pub. L. 94-83 is printed as an Appendix to this Memorandum.

pared by a State agency or official" if the federal official furnishes guidance and reviews the statement before adopting it and if the State agency is of statewide jurisdiction.[2]

Both the district court and the court of appeals concluded that the Federal Highway Administration had furnished guidance to the Vermont Highway Department (an agency of statewide jurisdiction), had participated in the preparation of the statement, and had reviewed and evaluated the statement prior to adopting it as a federal document. Accordingly, Congress has in effect overruled the court of appeals' holding that NEPA does not allow preparation of the impact statement by a State agency.[3] If this were the only issue in the case, it would be appropriate for this Court to vacate the judgment of the court of appeals and remand for further consideration in light of Pub. L. 94-83.

[2]The Conference Report (H.R. Conf. Rep. No. 94-388, 94th Cong., 1st Sess. (1975)) and other legislative history of the Act (see, *e.g.*, 121 Cong. Rec. H7739-H7750 (daily ed. July 29, 1975)) indicate that the primary purpose of the Act was to overturn the result in the instant case and in *Swain* v. *Brinegar*, C.A. 7 (reprinted at Pet. App. 83a-115a). Congress believed that this case and *Swain* were inconsistent with NEPA, and acted quickly to correct any misimpression the two cases may have created. The Act does not provide that all impact statements *must* meet these criteria, but only that, if they do, their authorship does not make them defective. Other statements (for example, statements prepared by agencies of less than statewide jurisdiction) are adequate if they meet the standards articulated in cases such as *Fayetteville Area Chamber of Commerce* v. *Volpe*, 515 F.2d 1021 (C.A. 4), petition for certiorari pending *sub nom. Interstate 95 Committee* v. *Coleman*, No. 75-180; *Friends of the Earth* v. *Coleman*, 513 F.2d 295 (C.A. 9); and the cases we have noted at Pet. 14.

[3]Section 102(2)(D)(iv) of NEPA, as added by Pub. L. 94-83, provides that interstate impacts shall be evaluated independently by the responsible federal agency. This subsection does not become effective until after January 1, 1976, however, and even then requires an independent evaluation only if a "[s]tate or * * * Federal land management entity" disagrees with the assessment in the State-prepared impact statement.

2. Pub. L. 94-83 does not affect the second issue presented by our petition—whether a separate impact statement must be prepared on 280 miles of four-lane highway, not yet proposed to or by any federal official, as a precondition to building 20 miles of two-lane highway. We submit that this question is now appropriate for summary decision in light of this Court's intervening decision in *Aberdeen & Rockfish R.R.* v. *SCRAP*, No. 73-1966, decided June 24, 1975 (*SCRAP II*).

The district court held, and the court of appeals agreed, that a separate impact statement on the effects of constructing a superhighway through the 280-mile "Route 7 corridor"' must be prepared because planners in three states hope, one day, to construct a superhighway through that corridor. But under NEPA "the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action." *SCRAP II, supra*, slip op. at 26; emphasis in original. Neither the district court nor the court of appeals found that any agency had made a "proposal" to construct a superhighway through the Route 7 corridor; nor has any agency, state or federal, made any recommendation or report on such a proposal.

Even if the desires of highway officials could be analogized to a "proposal" for NEPA purposes, the party that must make the recommendation or report is the federal agency, and the Federal Highway Administration has not yet either received or considered (let alone adopted, recommended or reported on) any proposal with respect to the entire Route 7 corridor. Even in the light most favorable to the Conservation Society, the findings of the courts below establish no more than that some state and federal employees have hoped that, in the future, their agencies will consider proposing further construction in the Route 7 corridor; no agency has proposed such con-

struction.[4] It follows directly that no impact statement was required and that the judgment of the court of appeals should be reversed. See Pet. 21-22.

Reversal at this time will substantially clarify the important question of the scope of the impact statement, a question relevant to every environmental case and one that will recur until settled by this Court. However, if the Court decides that summary reversal on this question is inappropriate, we request it to vacate the entire judgment of the court of appeals and remand with instructions to consider the effects of both Pub. L. 94-83 and *SCRAP II* on this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[4]This would be a different case if the courts below had required simply more extensive consideration of the effects (including the effects on the Route 7 corridor) of building the 20-mile segment. They did not do so, however; they required a separate statement concerning the effects of building 280 miles of highway.

APPENDIX

Pub. L. 94-83 provides:

That section 102(2) of the National Environmental Policy Act of 1969 (83 Stat. 852) is amended by redesignating subparagraphs (D), (E), (F), (G), and (H) as subparagraphs (E), (F), (G), (H), and (I), respectively; and by adding immediately after subparagraph (C) the following new subparagraph:

> "(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
>
> "(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
>
> "(ii) the responsible Federal official furnishes guidance and participates in such preparation,
>
> "(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
>
> "(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.
>
> The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction."